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TOWN ATTORNEY REPORT

DATE: February 12, 2003
FROM: Monroe D. Kiar
RE: Litigation Update

1. **Sunrise Water Acquisition Negotiations:** The Town requested competitive proposals for providing engineering services to conduct a western area utilities study. The Bid Selection Committee ranked URS as its first choice. At the Town Council Meeting of October 3, 2001, a resolution was approved selecting URS to provide engineering services for the western area utilities study and authorizing the Town Administrator to negotiate an agreement with URS for such services. The Town Attorney's Office has in the past, spoken with Mr. Cohen, who indicated that negotiations with URS have been ongoing. Mr. Cohen indicated that URS was requested to provide the Town with a Memorandum of Services setting forth their anticipated costs for each service to be rendered to enable the Town to determine the precise cost of the project and to determine if there are funds available to allow URS to conduct such services. A response has been received by the Town. The Town Attorney's Office has also spoken with Heidi of Mr. Colabella's office this date, who indicated that no agreement has been reached with URS as yet for conducting the engineering services for the western area utility study.
2. **Seventy-Five East, Inc. and Griffin-Orange North, Inc. v. Town of Davie:** A Final Order and Judgment Granting Petition for Common Law Certiorari was entered by Judge Patricia Cocalis in these two consolidated cases. Pursuant to the direction given to Mr. Burke by the Davie Town Council, an appeal of the Order entered by Judge Cocalis was filed with the 4th District Court of Appeal, but the 4th District Court of Appeal denied the Town's Petition for Writ of Certiorari on the Merits and Without Opinion, ordered that the matter be remanded back to the Town Council and required it to vote on the application based on the record as it existed prior to the filing of the Writ of Certiorari and in accordance with the Final Judgment entered by Judge Cocalis. The Petitioner requested the matter again be placed on the Town Council Agenda and the matter was again heard on October 2, 2002, by the Town Council. After a presentation by Mr. Burke, the applicant and Staff evidence was presented by those in attendance who spoke in favor and in opposition to the two Petitions, the Town Council voted 4 to 1 to deny each petition. A Petition for Supplemental Relief to Enforce Mandate, or in the Alternative, Supplemental Complaint for Writ of Mandamus and for Writ of Certiorari has

been filed by the Plaintiffs, Griffin-Orange North, Inc. and Seventy-Five East, Inc. with regard to the Quasi Judicial Hearing held before the Town of Davie on October 2, 2002. The Plaintiffs have filed these pleadings requesting that the Court order the Town of Davie to grant it the B-3 zoning and they are seeking a recovery of their attorneys' fees and court costs for their preparation and filing of this new Petition for Supplemental Relief to Enforce the Court's Mandate. Essentially, the pleadings request that the Circuit Court quash the Town Council's second denial of the Plaintiffs' zoning application and request that the Court compel approval of the B-3 zoning designation. The Plaintiffs have filed the pleadings with the same Court (Judge Cocalis) which previously entered a Final Judgment in favor of the Plaintiffs and have also filed an identical original action to cover all of their procedural basis. The Town Attorney's Office has reviewed the new pleadings filed by the Petitioner and has on several occasions, spoken with Mr. Burke, our special counsel, regarding their contents and litigation strategy. Mr. Burke previously indicated that the Petitioner filed a Motion to Consolidate the Petition for Supplemental Relief to Enforce Mandate as well as the second lawsuit it initiated, and requested that both lawsuits be heard before the original Judge in this case, Judge Cocalis, who is no longer in the Civil Trial Division, rather than Judge Robert Carney, who has taken over Judge Cocalis' prior case load. A hearing on the Petitioner's Motion to Consolidate the new Petition for Writ of Certiorari with its previously filed action was heard on December 17, 2002. Judge Carney granted the property owner's Motion to Consolidate, but denied the property owner's second Motion which was to transfer both actions back to Circuit Court Judge Patricia Cocalis. On January 15, 2003, the Town filed its Consolidated Response in Opposition to the Petition for Relief filed by Petitioner. The property owner thereafter, filed its Reply Brief and oral argument was heard on January 30, 2003, before Judge Robert Carney. As indicated in a prior Memorandum to the Town Council, the Town's response indicates that new evidence was presented for the Council's consideration, including the intense traffic congestion problems which were anticipated if a B-3 zoning application was applied to the property; the addition to the location of a school across the street from the subject property; and a park nearby, namely the Linear Park, all of which constitute recent and novel factual issues that the Town Council could consider at the October 2, 2002 Town Council Meeting. The property owners next filed a Petition with the Court to stay the pending administrative re-zoning of the two subject properties initiated by the Town. At the hearing of January 30, 2003, attended by Mr. Burke, Judge Carney requested additional time for the parties to brief the issue of whether he had power to compel the Town of Davie to approve B-3 zoning and accordingly, scheduled another hearing for February 14, 2003, at 1:30 P.M. to hear arguments of counsel concerning the matter. Mr. Burke indicates that essentially, Judge Carney is of the view that if he does not have the power to order B-3 re-zoning, he will deny the Petition for Writ of Prohibition filed by the property owners seeking to stay the pending administrative re-zoning and the Town's administrative re-zoning applications could then proceed forward. Conversely, if he does have the power to order B-3 re-zoning, he would then grant the Writ of Prohibition until he determines whether he should order B-3 zoning for the properties.

3. **MVP Properties, Inc.:** The Plaintiff previously filed a multi-count lawsuit in the United States District Court for the Southern District of Florida where a Final Summary Judgment in favor of the Town and against Plaintiff, MVP Properties, Inc. was granted by the Court. MVP Properties, Inc. appealed to the 11th Circuit Court of Appeals which later affirmed the decision of the lower court in favor of the Town of Davie and against the Plaintiff, MVP Properties, Inc. The Town is currently pursuing collection of the Judgment for costs that has been obtained

from MVP Properties, Inc. In the meantime, MVP Properties, Inc. has instituted a new lawsuit in which it has filed a Complaint for Inverse Condemnation against the Town of Davie. The Florida League of Cities declined to represent the Town in this latest lawsuit as actions for inverse condemnation are excluded from coverage by the League. Accordingly, the Town Attorney's Office has reviewed the Complaint for Inverse Condemnation filed by MVP Properties, Inc. against the Town of Davie and has timely filed a Motion to Dismiss the Plaintiff's Complaint. Said Motion to Dismiss had been scheduled for hearing for Tuesday, October 29, 2002, at 2:00 P.M. The Plaintiff however, requested that the hearing be continued to a later date and the hearing is now scheduled to be heard in February, 2003. The Town Attorney's Office is confident in the outcome of this litigation.

4. **Town of Davie v. Malka:** The Town Attorney's Office recently spoke with the Building Department and the Chief Building Official, Mr. Craig, confirmed that his staff is keeping a close eye on this particular property owner to ensure that the property owner is moving ahead with final completion of all additions of the structure as promised. During our last conversation, he indicated that there have been no recent complaints from the community.
5. **City of Pompano Beach, et al v. Florida Department of Agriculture and Consumer Services:** As indicated in prior Litigation Reports, on May 24, 2002, Judge Fleet issued a 19 page Order on the Motion for Temporary Injunction in which he concluded that the Amendments regarding the Citrus Canker litigation enacted by the Florida Legislature as codified in Florida Statutes Section 581.184, was an invalid invasion of the constitutional safeguard contained in both the United States Constitution and the Constitution of the State of Florida. The Judge ultimately entered a statewide Stay Order enjoining the Department of Agriculture from entering upon private property in the absence of a valid search warrant issued by an authorized judicial officer and executed by one authorized by law to do so. The Florida Department of Agriculture and Consumer Services filed its Notice of Appeal seeking review by the 4th District Court of Appeal. The Department of Agriculture also filed a Motion with the 4th District Court of Appeal seeking that the appellate procedures be expedited, and a motion in which there was a suggestion for "bypass" certification to the Supreme Court of Florida. The Department of Agriculture contended that in light of the gravity and emergency nature of the issues, the matter should be certified by the 4th District Court of Appeal directly to the Supreme Court for its adjudication since the Department of Agriculture anticipated that regardless as to how the 4th District Court of Appeal rules on the matter, it would in fact be appealed by either the Department of Agriculture or by the County and coalition of cities to the Supreme Court of Florida for final adjudication. The 4th District Court of Appeal in fact for only the fourth time in its history, did certify this matter directly to the Florida Supreme Court for adjudication. The Florida Supreme Court however, refused to hear this matter at this stage and remanded it back to the 4th District Court of Appeal for further proceeding. Both the Florida Department of Agriculture and Consumer Services and the County and coalition of cities have filed their respective Appellate Briefs. The Florida Department of Agriculture filed a Reply Brief to the Brief filed by Broward County and the coalition of cities. The Town Attorney along with several other municipal attorneys, at the request of the Chief Appellate Attorney for Broward County, Andrew Meyers, attended the oral argument in these proceedings before a three judge panel at the 4th District Court of Appeal Courthouse in Palm Beach County, on December 4, 2002. On January 15, 2003, the 4th District Court of Appeal issued its opinion relevant to the appeal filed by the Florida Department of Agriculture and Consumer Services challenging the Order of Judge Fleet. The 4th District Court of Appeal

found that Section 581.184 of the Florida Statutes (2002) requiring removal of Citrus trees within the 1900 feet of a tree infected with canker did not violate due process and therefore, was constitutional. The 4th District Court of Appeal also found Section 933.07(2) of the Florida Statutes allowing area wide search warrants unconstitutional and a violation of the 4th Amendment. The Court however, did rule that multiple properties to be searched may be included in a single search warrant and the issuance of such a warrant should be left to the discretion of the issuing magistrate. The 4th District Court of Appeal has entered an Order quashing Judge Fleet's Order and the Chief Appellate Attorney for the County has advised the Town Attorney's Office that the Count and coalition of cities will be appealing the ruling of the 4th District Court of Appeal to the Florida Supreme Court for final adjudication. Mr. Meyers of the County Attorney's Office has been further advised that it is the wish of the Town of Davie to be included as a coalition city in the pleadings to be submitted to the Florida Supreme Court.

6. **Christina MacKenzie Maranon v. Town of Davie:** The Town of Davie filed a Motion for Summary Final Judgment on behalf of the Town of Davie and Police Officer Quentin Taylor seeking to dismiss both parties as defendants in this lawsuit. In response, the Plaintiffs filed an Amended Complaint naming the Town of Davie only as a defendant. Officer Taylor was no longer named a party to these proceedings. The Florida League of Cities attorney assigned to this case has filed a Motion to Dismiss the Amended Complaint and has advised the Town Attorney's Office that if it is not granted, he will again file a Motion for Summary Judgment. On this date February 12, 2003, the Town Attorney conferred with our special legal counsel, Rick McDuff, regarding the status of this case. Mr. McDuff has advised the Town Attorney that the status remains the same and the Court has still not yet ruled upon the Town's Motion to Dismiss the Amended Complaint. Mr. McDuff continues to remain confident that the case will ultimately be dismissed by the Court in its entirety. In the meantime, the Plaintiffs continue to do little to move their case forward.
7. **Spur Road Property:** As indicated by Mr. Willi to the Town Council at its meeting of January 2, 2003, Mr. Burke advised Mr. Willi that the 4th District Court of Appeal had affirmed the decision of the Florida Department of Transportation to accept the bid of Kevin Carmichael, Trustee, for the sale and purchase of the property which forms the subject matter of the State Road 84 Spur property litigation. At the last Town Council Meeting of February 5, 2003, Mr. Willi requested that the Town Council grant him authority to take whatever legal action was necessary to obtain the property in question. That authority was given to him by the Town Council.
8. **Peter Castagna v. Officers Brito and Williams:** Peter Castagna filed a lawsuit against Officers Daniel Brito and Paul Williams alleging an action for damages pursuant to Title 42 U.S.C. 1983, for alleged false imprisonment, battery and alleged intentional infliction of emotional distress. The outside legal counsel assigned by the Florida League of Cities to defend the police officers at the League's expense, filed a Motion to Dismiss the lawsuit instituted by Mr. Castagna. Prior to the Motion being heard, the attorneys for Mr. Castagna filed an Amended Complaint and our special outside legal counsel has filed a Motion to Dismiss the Amended Complaint. The Town Attorney's Office spoke with Mr. McDuff on this date, February 12, 2003, and was advised that the Motion to Dismiss is still pending. In the meantime, the case is still scheduled for trial for May, 2003. Mr. McDuff has indicated that the parties are continuing to conduct further discovery and will continue to do so until the cutoff date in

March. Mr. McDuff has indicated that his office is in the process of preparing a Motion for Summary Judgment and expects to file same shortly. As indicated in prior reports, it is the belief of our Florida League of Cities Attorney that it is very questionable that the police conduct on June 25, 1999 resulted in the problems which the Plaintiff contends he now has as a result of the incident of June 25, 1999, and that the evidence will show that there was no improper conduct by the police officers in this matter.

9. **Covenant House of Florida, Inc. v. Town of Davie:** This matter has been settled whereby the Town Council entered into a Contract for the purchase of the real property which is the subject of the lawsuit and as part of the settlement proposal upon completion of the purchase, the lawsuit would be dismissed. The closing on the subject property located on Orange Drive took place on Thursday, November 14, 2002, and the Town is now the owner of the property. On December 30, 2002, the Town Attorney's Office received the Final Order of Dismissal signed by Judge Robert B. Carney and forwarded it to the Town Administrator. The Deed to the subject property was thereafter filed with Broward County for recording and upon receipt by this office of the recorded document, as well as the Owners' Title Insurance Policy, and the Bill of Sale, all were forwarded to the Town Administrator and Clerk for safekeeping on January 28, 2003. As this litigation is now concluded, the Town Attorney's Office will close its file on this matter.
10. **Pelican Coast Holdings, Inc. and William Cuthbertson v. Town of Davie:** A Petition for Certiorari was served upon the Town along with an Order to Show Cause signed by Judge Burnstein requiring the Town of Davie to show cause why the relief requested in the Petition for Certiorari should not be granted. On July 22, 2002, Appellee, Town of Davie, filed its response to the Petition for Writ of Certiorari and Pelican Coast Holdings, Inc. and William Cuthbertson have since filed their Reply Brief. Oral argument in this matter was held on October 3, 2002 and thereafter, both side submitted Memorandum of Law in support of their respective positions. On October 28, 2002, Judge Burnstein issued her Order in this case. The Court granted the Petition for Writ of Certiorari and quashed the condition imposed by the Town Council at its May 15, 2002 Meeting that the owner of the property obtained a "special permit" from the Council, if the owner seeks to serve alcoholic beverages at the site. The Court does however, make clear that the owners and users of the property are bound by the separation requirements for alcoholic establishments, but the Court proposes that the Town would be able to monitor the owner's compliance through its occupational licensing regulations. The Court has also ruled that the Petitioner is entitled to recover its attorney's fees in prosecuting the appeal. A copy of Judge Burnstein's Order of October 28, 2002 has been previously provided to the Mayor and Councilmembers. At the first meeting in November of the Davie Town Council, the Council authorized Mr. Burke's firm to file the necessary paperwork to challenge Judge Burnstein's Order of October 28, 2002. Pursuant to the Council's instructions, a Petition for Writ of Certiorari was filed on behalf of the Town of Davie with the 4th District Court of Appeal. The Petition was reviewed by a 3 judge panel of the 4th District Court of Appeal and the Town Attorney has been advised by Mr. Burke that the Court has denied the Town's Petition for Writ of Certiorari, but also denied the request of the property owner for an award of attorney's fees on the appellate level. The only remaining issue is what amount, if any, is to be awarded to the Petitioner with regard to attorney's fees on the Circuit Court level. To date, no hearing on this issue has been scheduled.
11. **DePaola v. Town of Davie:** Plaintiff DePaola filed a lawsuit against the Town of Davie and the

Town filed a Motion to Dismiss. The Motion to Dismiss was heard by Judge Burnstein who requested that both sides file Memoranda of Law in support of their positions and she took the case under advisement. Both sides did file their Memoranda of Law in support of their positions on the Town's Motion to Dismiss, and on November 13, 2002, the Court entered an Order granting the Town's Motion to Dismiss and entered an Order of Dismissal. The Court found that Mr. DePaola had administrative remedies as a career service employee, either by pursuing a civil service appeal or by a grievance procedure established under a collective bargaining agreement, but he had failed to pursue his administrative remedies. A copy the Court's Order of November 13, 2002, has been previously provided to the Town Council for its review. The Plaintiff DePaola filed a motion with the Court for re-hearing of the Town's Motion to Dismiss, which motion was denied by the Trial Court. The attorneys for DePaola have since filed a Notice of Appeal of the Trial Court's decision to the 4th District Court of Appeal, but as yet, have not filed their Brief.

12. **Southern Homes of Davie, LLC v. Davie (Charleston Oaks Plat) Case No. 02-015674 (11):** The Town was served with a Summons and Complaint for Declaratory Judgment and Injunction and Petition for Writ of Mandamus with regard to Case Number 02-015674 (11) instituted by Southern Homes of Davie, LLC against the Town of Davie relevant to the "Charleston Oaks Plat". The Florida League of Cities has accepted responsibility for providing a defense to the Town of Davie relevant to this lawsuit and has assigned the case to Attorney Michael Burke. The Plaintiff is seeking both equitable relief and monetary damages against the Town. The Plaintiff is alleging that they have suffered injury as a result of the Town's refusal to process, review and/or approve its Site Plan Application while the Zoning in Progress has been in effect. They are seeking an Order declaring that the Plaintiff is entitled to approval of its Site Plan Application and that the Town be estopped to apply the "Zoning in Progress"; declaring that the Zoning in Progress does not exist and/or does not apply to Plaintiff's Site Plan Application and/or Plaintiff's property, and other relief. Since then, the Plaintiff has filed a second companion case also seeking a Declaratory Judgment and Injunction and Petition for Mandamus against the Town of Davie with regard to the "Flamingo Plat". This too, has been accepted for defense by the Florida League of Cities. Both cases have been since consolidated for discovery purposes and Mr. Burke's firm has filed its response to each Complaint filed in the two lawsuits. On this date, February 12, 2003, the Town Attorney has again discussed this matter with our special outside counsel, Mr. Burke. Mr. Burke has had further discussions with the attorneys for the Plaintiff regarding the potential dismissal of both lawsuits in light of the Town Council's recent actions approving the Code changes pertaining to Zoning in Progress. A written proposal from Attorney Spencer was received, but it was extremely broad and encompassed far more than the two parcels of real property which are known as the Charleston Oaks Plat and the Flamingo Plat. The Town Attorney and Mr. Burke reviewed the proposed Stipulation together and Mr. Spencer has been advised that it is not acceptable in its current form. Attorney Spencer has requested that the Town submit its proposed revisions to the document. Mr. Burke indicated to the Town Attorney this date that he would like to schedule a joint meeting with the Town Administrator or his designee, Mr. Kutney, the Town Attorney and himself to formulate an appropriate response to be provided to the Plaintiff's attorney, Mr. Spencer.
13. **Asset Management Consultants of Virginia, Inc. v. Town of Davie:** The Town of Davie has been sued by Asset Management Consultants of Virginia, Inc., who are seeking a refund of a public service fee imposed on certain property owners by the Town pursuant to Ordinance

No. 99-35 of the Town Code. The Town filed a Motion to Dismiss the Complaint along with a Memorandum of Law in support of the Town's position. The Town's position is that at the time of the passage of Ordinance No. 99-35 of the Davie Town Code, it was properly initiated and therefore, the Plaintiff is not entitled to a refund of the public services fees which were subsequently declared unconstitutional and contrary to Section 192.042 of the Florida Statutes by the Florida Supreme Court in 1999. The Town of Davie's Motion to dismiss the lawsuit was heard on Friday, November 15, 2002, and after Judge Greene heard lengthy oral argument on both sides, the Court granted the Town of Davie's Motion to Dismiss Plaintiff's Complaint. The Judge granted our Motion to Dismiss with Prejudice as to Count II, which was a claim by the Plaintiff against the Town of Davie for unjust enrichment with regard to the Town of Davie's collection of the public service fee which was subsequently ruled unconstitutional. The Judge also granted the Town's Motion to Dismiss Counts I and III in which the Plaintiff sought a declaratory judgment and a refund of the public services fee that was collected relevant to the Plaintiffs. The Judge also struck with prejudice that portion of Count III which sought prejudgment interest against the Town if the Plaintiff is successful. The Judge did give the Plaintiff 20 days in which to amend Count I and the balance of Count III. A copy of the Court's Order of November 15, 2002, was previously forwarded to the Town for distribution to the Mayor and Councilmembers. The Plaintiffs filed a Motion for Extension of Time to submit their Amended Complaint and their request was granted. The Amended Complaint was ultimately filed by the Plaintiffs on January 3, 2003, and Mr. Johnson indicated to the Town Attorney this date that his office has just filed an appropriate response to the Amended Complaint, namely another Motion to Dismiss. Mr. Johnson is confident in the outcome of this litigation.

14. **Michael Biglen v. Town of Davie:** The Plaintiff has sued Florida Power & Light Company, the Town of Davie and several other defendants. The Plaintiff alleges that he made contact with an overhead power line owned by Florida Power & Light Company while he was on the premises of a private land owner. Nevertheless, he asserts claims for negligence against the Town claiming a duty owed by the Town to enforce compliance with one of its ordinances. The Town has filed a Motion to Dismiss the Plaintiff's Second Amended Complaint for failure to state a cause of action for premises liability against the Town of Davie, that the Plaintiff's claims are barred by sovereign immunity, and seeking an award from the Plaintiff of attorney's fees and costs pursuant to Florida Statutes §57.105. It is the Town's position that the Plaintiff has asserted claims against the Town without a good faith basis in doing so and that no facts or legal theories support the Plaintiff's claims and therefore, based on the circumstances, the Town is entitled to an award of its attorney's fees and costs. On January 16, 2003, the Court heard the Motion to Dismiss filed on behalf of the Town of Davie to dismiss the Plaintiff's Second Amended Complaint. After hearing argument of counsel and reviewing the case law provided, the Court reserved ruling. Mr. Johnson, our Florida League of Cities Attorney, has advised the Town Attorney this date, February 12, 2003, that he has not yet received a decision from the Court, but is hopeful of receiving one shortly.
15. **City of Cooper City v. Town of Davie:** The City of Cooper City has filed a lawsuit for Declaratory Judgment and Injunctive Relief and Alternative Petitions for Writ of Quo Warranto and Certiorari alleging that a recent ordinance and a recent resolution relevant to annexation are invalid. The Town Attorney's Office has prepared an appropriate Motion to Dismiss and has filed same as the Town's insurance carrier has refused to provide a legal defense to this action. This matter was originally noticed to be heard for oral argument on

February 19, 2003, but the Court has since advised that the earliest time it will entertain oral argument is the second week of March and accordingly, the Town Attorney's Office has filed a Re-Notice of Hearing setting the Town's Motion to Dismiss for the earliest possible date, namely March 13, 2003. The Town Attorney's Office is confident in a successful outcome of this litigation.